

No. 86-767

Supreme Court, U.S.  
FILED

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JOSEPH F. SPANIOLO, JR.  
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In The  
**Supreme Court of the United States**  
October Term, 1986

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**ALEJANDRO PEREZ,**

*Petitioner,*

vs.

**LAREDO JUNIOR COLLEGE, *et al.*,**

*Respondents.*

— 0 —  
**On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit**

— 0 —  
**RESPONDENTS' BRIEF IN OPPOSITION**

— 0 —  
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## **QUESTIONS PRESENTED BY PETITIONER**

Where a reply brief is timely filed and addresses material issues not previously argued and essential to the just determination of an appeal, is it error for the Court of Appeals, without notice, to decide the case before receiving and considering the reply brief?

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**RESPONDENTS' BRIEF IN OPPOSITION**

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TO THE HONORABLE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE UNITED STATES:

Respondents, Laredo Municipal Junior College District, Domingo Arechiga and the Board of Trustees of the Laredo Municipal Junior College District, respectfully re-

quest that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case.

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### **GROUNDS FOR JURISDICTION**

This Court's jurisdiction is predicated upon 28 U.S.C. Section 1254 (1).

—0—

### **STATEMENT OF THE CASE**

In addition to the Petitioner's Statement of the Case, Respondents would add that in Petitioner's (Appellant below) brief on the merits, filed in the Fifth Circuit, and in Respondents' (Appellees below) reply brief, the parties in effect agreed, pursuant to Rule 34 (f), F.R.A.P., to waive oral argument and submit the case to the Fifth Circuit on the respective briefs.

—0—

### **ARGUMENT**

Petitioner contends that because the opinion by the panel of the Fifth Circuit deciding the case below, was written and initialed by the three judges before (and in the last instance on the same day) the Petitioner filed his Reply Brief in the Fifth Circuit, that the Fifth Circuit committed reversible error in deciding the case prior to considering his Reply Brief. There is no evidence that

the panel members did not consider the Reply Brief before the opinion was released, and in fact Respondents' counsel is advised that the "opinion writing" member of a panel in the Fifth Circuit is consistently furnished copies of all Reply Briefs immediately after same are filed, and in this case would have been furnished such Reply Brief by no later than two days prior to the release of the opinion. Irrespective of whether or not one or all of the panel members were furnished or considered such Reply Brief prior to the release of the opinion, Petitioner thereafter filed a Motion for Rehearing (a copy of which is reproduced in the Appendix hereto). If the panel deciding the case below did not have the benefit of Petitioner's Reply Brief before initially deciding the case and issuing its opinion, the same panel was expressly made aware of the contents of such Reply Brief, as well as the same procedural complaint now advanced by Petitioner. The panel after being made so aware and having an opportunity to consider Petitioner's additional arguments, denied the Motion for Rehearing. The trial court below determined that no material issue of fact was raised by the summary judgment evidence and that Respondents were entitled to summary judgment. The Fifth Circuit after reviewing the record, concurred and affirmed the judgment. Petitioner has not been denied any procedural or substantive right. Petitioner has had ample opportunity to advance all of his arguments, contentions and counter-arguments, and has had the trial court and the Fifth Circuit pass on same.

## CONCLUSION

Petitioner has failed to show any error on the part of the Fifth Circuit which affects his rights, and his Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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Domingo Arechiga, Board of  
Trustees of Laredo Municipal  
Junior College District*

**APPENDIX**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

NO. 86-2065

ALEJANDRO PEREZ,

Plaintiff-Appellant,

vs.

LAREDO UNION COLLEGE, ET AL.,

Defendants-Appellees.

**APPELLANT ALEJANDRO PEREZ'S PETITION  
FOR REHEARING**

Alejandro Perez, the Appellant, respectfully petitions the panel for rehearing and reconsideration of its opinion.

The opinion rendered by this Court shows on its face that it was made prior to and without consideration of the reply brief of the Appellant.

No order altering the briefing schedule, nor otherwise expediting the appeal, was entered. Accordingly, the decision by the Court was inconsistent with the provisions of the Federal Rules of Appellate procedure. It also was inconsistent with the published Internal Operating Procedures of the Court, which call for screening of a case only after the briefing has closed.

Specifically, the record shows that the reply brief was filed July 2, 1986. The opinion is endorsed on its face with the initials of the three members of the panel, bearing dates of June 21, 1986, June 25, 1986, and July 2, 1986. (The Appellee's brief was filed June 17, 1986).

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Had the Court considered the reply brief, it would have had to reach contrary conclusions on the two central points in its opinion.

First, the Court characterizes the granting of summary judgment as an action of reconsideration, not sua sponte action by the Trial Court. This Court states that Dr. Perez had an opportunity to respond and did respond to the proposed action by the Court. Such a conclusion thoroughly is illogical, as demonstrated in the reply brief. The response by Dr. Perez was precisely to request that fair notice be given as to what the Court contemplated: "It is respectfully requested that if the Court is to give consideration to the motion of the Defendants that notice be provided to the Plaintiff, together with an opportunity to file a response." Rec. Exc. at 56.

Dr. Perez was not complaining about any perceived need for additional time. He specifically protested because the statement by the Court did not provide sufficient notice with respect to the issue to be considered.

The compounding in this Court of a denial of an opportunity to present an argument with respect to the denial of the opportunity to present an argument below constitutes a manifestly unfair deprivation of due process.

Secondly, the opinion of the Court oversteps the bounds of summary judgment procedure to invade the fact finding province of the jury. Thus, this Court states: "Perez's degree is obviously outside of and unrelated to his teaching field." Opinion at p. 6.

The opinion of this Court, and its factual recitation, accurately sets forth that Dr. Perez has been assigned to

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teach mathematics and received a Ph.D. degree in educational administration. Opinion p. 2.

In the reply brief, the Plaintiff demonstrates that the summary judgment evidence before the Court showed that another math professor had received additional pay for a Ph.D. in education. Dr. Perez's Reply Brief at p. 8.

Dr. Perez must conclude that the Court was unaware, not having read his reply brief, of the blatantly different treatment accorded an undisputedly similarly situated faculty member. How else can one explain the bold conclusory assertion by this Court, at p. 7 of the Opinion, "All five of the teachers referred to in Perez's complaint have Ph.D.s in their teaching fields or in closely related areas."

Consider the others, mentioned in Dr. Perez's Reply Brief at pp. 8-9. Dr. Trevino taught reading and received his Ph.D. in educational administration. Dr. Olson taught history, but received a degree in teaching. Dr. Sanchez taught English, but got his doctor's degree in Spanish.

Even assuming that this Court strenuously disagrees with Dr. Perez's conclusion that it would take an impossible leap of logic to relate the doctorate fields to the teaching areas in these cases, this determination is one of fact. It is inappropriate to determine by summary judgment. Dr. Perez is entitled to the jury which he timely requested.

### *Conclusion and Prayer*

Expediting appellate decisions is a truly worthwhile goal. The rules provide devices by which the parties or the Court can engage in such an endeavor. Dr. Perez, like all other parties before this Court, however, is entitled to rely upon and have the benefit of the applicable rules.

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The rules permitted him to present and have considered a reply brief. Failure to consider the reply was prejudicial in that it resulted in a totally unsupportable opinion. This petition for rehearing should be granted, the opinion vacated, and the case given the due consideration it deserves.

Respectfully submitted,

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OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 1986, a true copy of the foregoing Appellant Alejandro Perez's Petition for Rehearing was served on the attorney in charge for Defendants-Appellees by placing same in the United States mail postage prepaid and properly addressed as follows:

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/s/ David T. Lopez

